United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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74-1505

To be argued by
John R. Horan

UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket Numbers

74-1529

and

74-1505

Walter H. Weiner,
Petitioner-Appellant

against

Commissioner of Internal Revenue,
Respondent-Appellee

Lois F. Weiner,
Petitioner-Appellee

against

Commissioner of Internal Revenue,
Respondent-Appellant

On Appeal from the United States Tax Court

BRIEF OF PETITIONER-APPELLEE

JOHN R. HORAN
299 PARK AVENUE

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Preliminary Statement

This is an action brought in the United States Tax Court (Docket No. 6255-70) by Petitioner-Appellee (the "Wife") against the Respondent-Appellant, Commissioner of Internal Revenue (the "Commissioner") to contest deficiencies determined in petitioner's federal income taxes for the year 1965 in the amount of $525.89, and for the year 1966 in the amount of $595.22. These deficiencies were determined by the Commissioner after a deficiency had been made as to the Husband's federal income taxes for the year 1965 in the amount of $934.15 with respect to payments by the Husband to the Wife under a separation agreement, to protect itself against contradictory positions being asserted successfully by both the Husband and the Wife. The Husband petitioned the Tax Court, as did the Wife and both petitioners were consolidated for trial. The United States Tax Court, by Judge Samuel B. Sterrett, upheld the Commissioner's deficiency against the Husband and entered a decision for the respondent Commissioner in the Husband's action and for the petitioner in her action. This brief is submitted by the Wife in opposition to the brief submitted by the Husband who has appealed from the judgment of the Tax Court upholding his deficiency.

Issues Presented

1. Was sufficient evidence adduced at trial to support the finding of the United States Tax Court that the separation agreement provided for payment to the Wife for her equity in the family residence, and that such payment was therefore not alimony within the meaning of Sections 71(a) and 215 of the Internal Revenue Code?

2. Did the United States Tax Court properly deny the Husband's motion to recompute the tax deficiency found against him based on an alternate theory of deduction under Section 483 of the Internal Revenue Code which had not been raised until after the Tax Court had rendered its decision?

Statutes Involved

The statutes involved in this action are Sections 71, 215 and 483 of the Internal Revenue Code, 26 U.S.C. Subtitle A, Chapter 1. The statutes are accurately set forth in an addendum to appellant's brief and a copy of that addendum is submitted herewith for the convenience of the court.

Statement of the Case

Appellant's statement of the case, (pages 3 and 4 of Appellant's brief) satisfactorily sets forth the proceedings thus far and pursuant to Rule 28(b), Federal Rules of Appellate Procedure the court is respectfully referred thereto.*

Statement of Facts

Before the trial the parties entered into a stipulation of facts (Stip.) which included various Exhibits all of which were admitted into evidence and form the factual record on appeal along with the testimony at the trial itself.

Appellant Walter H. Weiner and Appellee Lois F. Weiner were married on September 7, 1952 in Fort Wayne, Indiana. They entered into an agreement of separation (the "Agreement") dated March 3, 1965, and were divorced in New York state later in March 1965. During various periods of the marriage between 1955 and 1965 Lois Weiner was hsopitalized for mental illness, and during the period crucial to the negotiation of the separation agreement she was hospitalized at High Point Hospital, Port Chester, New York (March 1964-June 1965) (Stip. p.2).

*References will be made to the original paging of each part of the record. Rule 30(c), Federal Rules of Appellate Procedure. The following abbreviations will be used herein: (Decision) - Decision of the Tax Court; (Findings) - Findings of Fact and Opinion of the Tax Court; (Order) - Memorandum See Order of the Tax Court; (Stip.) - Stipulation of Facts; (Tr.) - Transcript of Trial.

The Agreement of Separation.

The agreement (Stip. Exhibit I) as far as it is relevant to this action provides in paragraph 2:

> "Simultaneously with the execution hereof and as part of the consideration therefor, the Wife has executed, acknowledged and delivered to the Husband a deed conveying all of her right, title and interest in and to the house and land known as 10 Homeside Lane, White Plains,N.Y.(hereinafter called the Home), and the Husband does hereby agree to indemnify and hold the Wife harmless from any liabilities in connection with the mortgage and accompanying note or bond now a lien thereon. The Wife hereby confirms the ownership by the Husband of all furniture, house furnishings, glassware, and silverware in his and/or her possession or control, including the entire contents of the Home, except certain articles listed in Schedule A attached hereto."

In paragraph 3. the agreement provides for alimony as follows:

> "(a) The Husband and the Wife recognize that, having regard for the financial circumstances of the parties and the financial requirements imposed on the Husband in view of the custody arrangements hereinafter set forth, the Wife will require $200 a month from the Husband for her support and maintenance, and that upon the death of Clara Field, mother of the Wife, the Wife expects an inheritance (outright or in trust) from her mother which will help enable her to support and maintain herself. Husband and Wife agree, however, that supplementary payments over a period of several years shall be made by the Husband to the Wife in order to help defray the relatively substantial disbursements which the Wife may make in paying certain extraordinary current expenses and in establishing a residence separate from that of the Husband and the Children. In contemplation of the foregoing (but whether or not such an

inheritance shall be received from the mother of the Wife), the Husband has agreed to make, and the Wife has agreed to accept, in full satisfaction of her rights during her life to support and maintenance from the Husband, the following periodic payments:

(i) $200 on the first day of each month commencing March 1, 1965, and ending on the first day of the month in which the Wife shall either die or remarry, whichever shall first occur;

(ii) $400 on the first day of each month commencing March 1, 1965, and terminating on the first day of the month in which total payments to the Wife pursuant to this subparagraph (ii) equal or exceed $29,000, provided, however, that if, for any reason, the income of the Husband shall diminish from his income during 1964 from the practice of law, or the financial requirements of the Children would be impaired by making such additional payments in the amount of $400, the Husband may, at his option, reduce such additional payment to an amount not less than $200 a month, in which case additional payments to the Wife pursuant to this subparagraph(ii) shall continue until the first day of the month in which total payments to the Wife pursuant to this subparagraph (ii) equal or exceed $29,000.

(b) Anything in this Agreement to the contrary notwithstanding, the obligations of the Husband to make the payments provided in Section 3(a) of this Agreement shall not extend beyond the lifetime of the Wife.

(c) The Husband and the Wife will, if permitted by law, file joint Federal and New York State income tax returns for the calendar year ending December 31, 1964. The Husband will pay the entire tax due on the filing of such returns."

During the trial, the testimony of Lois Weiner revealed the full facts of events leading up to the closing of the Agreement upon which the trial court relied in reaching its decision to disallow the deductions for alimony taken by

the appellant pursuant to his understanding of paragraph 3. The court concluded that under the circumstances of this matrimonial negotiation the intention of paragraph 3(a)(ii) of the agreement was to reimburse Lois Weiner for her equity in the family residence. There is ample support for Judge Sterrett's finding.

The Family Residence.

In the early fall of 1958, Mr. Weiner wrote an urgent letter to Mrs. Weiner's mother asking for $35,000 to purchase a house for the family, basing his plea on the critical state of Mrs. Weiner's mental health (Stip. Exhibit II, letter c). Mrs. Weiner's mother, Clara Field, was the settlor of a trust of which the Lincoln National Bank & Trust Company was trustee, and after various letters and conversations between Mr. Weiner and the trustee a loan to Mrs. Weiner was arranged by the trustee in the form of a total of 125 shares of common stock of the Lincoln National Life Insurance Company (Stip. Exhibit II). The stock was then sold and the proceeds used by Mr. and Mrs. Weiner to buy a house at 10 Homeside Lane, White Plains, New York and for expenses incident to the purchase. Mrs. Weiner testified that the loan from the trust was an advancement against her inheritance (Tr. 57). This is supported by the documentary evidence.

The trustee was willing to enter into the transaction if the loan contract could be carried as a trust asset and set off, if not repaid, against Mrs. Weiner's inheritance. (Stip. Exhibit II, letter e).

In summary, the testimony of Mrs. Weiner, and the Exhibits stipulated to as facts provide overwhelming evidence that in the final analysis Mrs. Weiner's stocks were sold for the sole purpose of purchasing a house, and that the amount of her equity in that house was at least $29,500.

Negotiations.

There was considerable testimony about the negotiations leading up to the agreement. Lois Weiner was "hazy" as to the nature of the negotiations of her husband (Tr. 26). Divorce discussions had proceeded for several months before the closing; Mrs. Weiner was depressed and in a hospital much of this time while pressing Mr. Weiner for a divorce which she wanted desperately. (Tr. 32-34). When Mr. Weiner finally agreed to divorce, clearly against his will (Tr. 34), the only negotiating stance Mrs. Weiner clearly recalls asserting herself was that Mr. Weiner would have to pay her for her equity in the house (Tr. 66). She thought she had no choice in how the agreement was drafted as Walter had advised her that she had none; she would not get the divorce unless he was allowed to dictate the financial terms (Tr. 69).

In spite of this Mrs. Weiner expressed her faith in her husband on questions of money (Tr. 26). She found it difficult to speak to him at all, even about the amount of the equity value of her interest in the home, and left this matter to her attorney who ultimately accepted the terms Mr. Weiner was willing to offer, succeeding, however, in moving the amount offered for the house from $26,000 to $29,000 (Tr. 45). The agreement was prepared by Walter Weiner himself (Tr. 36), and discussed by Mrs. Weiner with her attorney (Tr. 35), and later read with great difficulty by her before she signed it in the hospital (Tr. 50).

Walter Weiner rested his direct case on the introduction into evidence of the separation agreement (Tr. 20). In rebuttal to the testimony of Lois Weiner he testified that the payments required by paragraph 3(a)(ii) were really based upon his prediction of estimated future medical expenses for Mrs. Weiner's mental illness (Tr. 87, 96, 97). However, he admitted that the shares transferred by Mrs. Weiner's trust had been sold for $29,500 and the proceeds used entirely to purchase the home, but he denied the connection between those sale proceeds and the amount stipulated in the agreement for alimony (Tr. 93, 100, 107). Mr. Weiner in fact sold the family house after the divorce (Tr. 109), although there is no testimony as to how much he realized. Clearly under the agreement of separation by which he became sole owner of the property he was entitled to all the proceeds of that sale.

The testimony of Mr. Miller, attorney for Lois Weiner during the negotiations with Mr. Weiner and at the trial of this case, was to the effect that counsel for Mr. Weiner (a member of Mr. Weiner's firm) had said that the agreement had to be signed in the way structured by Mr. Weiner or there would be no agreement (Tr. 113, 114).

Thus, the facts, both as stipulated, and as revealed in the testimony of Mrs. Weiner and Mr. Miller completely support the Tax Court's findings that Mrs. Weiner had an equity interest of at least $29,500 in the house; that the separation negotiations were one-sided and essentially dictated by Mr. Weiner to his tax advantage; that the payment of $29,000 to Mrs. Weiner under the agreement was recognition by Mr. Weiner that this amount was a settlement for the value of her interest in the house, and not his estimate of her projected medical bills.

On page 8 of Appellant's Brief in his Statement of Facts it is asserted that there was no contention at trial that the payment to Mrs. Weiner of $29,000 was intended to be a property settlement. This assertion is simply not true. The only demand Mrs. Weiner recalls making on Mr. Weiner during the "negotiations" was that he "repay her for the house."(Tr. 45, 47, 66).

Argument

I.

THE EVIDENCE IN THE RECORD STRONGLY SUPPORTS THE FINDINGS OF THE TAX COURT THAT APPELLANT'S PAYMENTS UNDER THE AGREEMENT WERE COMPENSATION FOR PROPERTY RIGHTS OF THE APPELLEE

The appellant herein in essence argues for reversal on the ground that there was no evidence at trial, either by stipulation or by testimony, to support the Tax Court's Findings of Fact and Opinion (Order) that "Based on all the evidence, we find that the Separation Agreement in reality, provided for payment to Lois for her equity in the house, which recompense she had demanded throughout the divorce negotiations." (Order p. 11).

The appellant further contends that the Tax Court was in error in concluding that it would be guided by Edith M. Gerlach, 55 T.C. 156 (1970) and that it would not follow either the "parole evidence rule" as prescribed in Commissioner v. Danielson, 378 F. 2d 771 (3rd Cir. 1967), cert. den. 389 U.S. 858, rev'g 44 T.C. 549 (1965), or the "strong proof rule" prescribed by J. Leonard Schmitz, 51 T.C. 306 (1968), aff'd sub. nom Throndson v. Commissioner, 457 F.2d 1022 (9th Cir. 1972), and by Ullman v. Commissioner, 264 F. 2d 305 (2nd Cir. 1959), aff'g 29 T.C. 129 (1957).

The first contention is a threadbare factual argument based upon a selection from the record at trial which can be best described as a process of omission. The second contention is a legal argument concerning burden of proof and is equally threadbare; the same argument has been repeatedly rejected by the Tax Court and on appeal by Federal Courts in cases not even alluded to by appellant.

As to evidence in the record, appellant asserts in several places (pages 12, 13, 14 of Appellant's brief) that there was no evidence of intent to treat the Husband's payment as a property settlement; as his only support for this contention he refers to the testimony of Mr. Miller in which Mr. Miller stated that he had advised Mrs. Weiner that the payments under paragraph 3(a)(ii) of theagreement would be taxable to her as alimony. (Tr. 112). Of course he so advised her, having agreed to the terminology of the Agreement drafted by Mr. Weiner. However, the Tax Court quite rightly rejected Mr. Miller's testimony as controlling on the issue of intent (Order p. 10); also, the court rejected as incredible the testimony of appellant that the amount to be paid to Mrs. Weiner under para. 3(a)(ii) ($29,000) was intended to cover her medical expenses for the four years following the divorce. The Court turned for credible evidence of the intent of the parties to the testimony of Mrs. Weiner. As Mrs. Weiner testified that her principle goal in the

negotiations before the agreement was to be paid by Mr. Weiner for her interest in the family residence, and that she was concerned with little else (Tr. 26, 34, 45, 47); the contention that there is no evidence in the record to support the Tax Court's finding is baseless.

The only witnesses at trial were Appellant, Mrs. Weiner, and her attorney, Mr. Miller. The Tax Court clearly chose to believe Mrs. Weiner's testimony and to base his finding of intent upon her evidence, as well as the ample documentary proof which showed that the amount $29,000 was almost exactly the amount which she, by means of her family's trust, had contributed to the purchase of the family residence.

The real interest of the parties, particularly in negotiations before a separation agreement or divorce, often can only be inferred from a welter of events and pressures. Clearly the labels or terminology used by the draftsman of an agreement or courtroom stipulation are not controlling. Mills v. Commissioner, 442 F. 2d 1149 (10th Cir. 1971), aff'g 54 T.C. 608 (1970); Taylor v. Campbell, 335 F. 2d 841 (5th Cir. 1964); Enid P. Mirsky, 56 T.C. 664 (1971); Edith M. Gerlach, supra; Phinny v. Mauk, 411 F. 2d 1196 (5th Cir. 1969).

Furthermore, a long line of Tax Court, as well as Circuit Court of Appeals cases support the trial judge's premise that matrimonial negotiations leading to a divorce or separation

agreement are by their nature totally unlike business negotiations; there is the additional consideration of the various state laws about divorce in the context of which matrimonial negotiations are carried on. Although the matter was not discussed in the proceeding below this Court can judicially notice that under the Domestic Relations Law of the State of New York (Section 234) the Supreme Court will not order the transfer of real property jointly held to one spouse or the other, nor will it order payment of a lump sum. If Mr. and Mrs. Weiner had been unable to reach a settlement before divorce, and had subsequently sold the house, Mrs. Weiner could have sought to impress a trust on the proceeds of sale to the extent of her contribution ($29,500). Also the federal taxing authorities have an interest in creating uniformity of treatment under the federal tax laws. These considerations have lead the Tax Court to consistently open the question of intent as to separation agreements and divorce decrees. See Enid P. Mirsky, supra at p. 675, and cases cited therein.

Appellant's effort to distinguish Edith M. Gerlach, supra as not controlling in this case is misguided. Even if ambiguity is the only test to be met before a separation agreement and the intent of its parties can be challenged by IRS, the agreement herein contains ambiguity enough, or at least coincidence in need of explanation. Why does Mrs. Weiner receive precisely $29,000? Why would she transfer her interest in the family residence to her husband unless she received some settlement?

As in this case, the Tax Court in Gerlach chose to disregard the bare language of the agreement and accept the testimony of the Wife as to why certain provisions were in the agreement. Here Mrs. Weiner testified several times that she wanted a divorce and was only concerned with being paid for her interest in the house. Mr. Weiner then drafted the agreement himself, placing the transfer of her interest in the house in paragraph 2 and the payment for that interest in paragraph 3, calling it alimony and drafting it to meet the standards of Sections 71 and 215 of the Internal Revenue Code so that he would have the maximum tax advantage for the repayment. Otherwise why would he have divided the payments in paragraph 3, and why would he have placed a limit of $29,000 on his payment? The answer lies in the documents annexed to Exhibit II of the Stipulation; they reveal in full detail that the amount of $29,000 was rooted in the transactions whereby Lois Weiner put up $29,500 for the purchase of their house. Edith M. Gerlach, supra is a controling precedent because the issue raised was precisely the same and the factual circumstances nearly identical. It is not a meaningful distinction that Gerlach involved an oral agreement made in court. In that case the issue raised was whether certain periodic payments received by Mrs. Gerlach from her former husband were alimony and therefore taxable income to her, or whether they were in fact settlement payments for her interest stock of a

corporation jointly held by her and her former husband. The Tax Court credited the testimony of Mrs. Gerlach as to the intent of the parties and found that the real intent of the husband was to gain a tax benefit to himself in calling periodic payments alimony which were really compensation to his former wife for her own property interest.

Appellant goes on even more implausibly to argue that this court should reverse the Tax Court for following Edith M. Gerlach, supra, and for not adopting the evidentiary rule of Commissioner v. Danielson, supra. The reasons for not applying the rationale of Danielson to separation agreements arrived at in the context of dissolution of a marriage are evident. In an agreement to purchase business assets the parties presumably bargain at arms length and usually, although not always, with certain bargaining equality which leads to terms and allocation of tax impact acceptable to both buyer and seller. Even so, the Danielson holding that a party to such an agreement should not be able to alter its tax consequences unless proof can be adduced which, in an action between the parties to the agreement, would be admissible to alter its construction, such as fraud or duress, may not make eminent sense.*

*In a full and eloquent dissent to Danielson, Judge Staley, citing Eisner v. Macomber, 252 U.S. 189, and Weiss v. Stearn, 265 U.S. 242, calls the majority's holding a "new rule" and invokes the cardinal maxim of equity that courts must look to substance, not form, and that questions of taxation (peculiarly subject to taxpayer manipulation) must be determined by viewing what was actually done and intended.

However, as the Tax Court below correctly emphasized,during the negotiations before the separation agreement herein, Lois Weiner was suffering from painful depression, was residing as a patient in a mental hospital, and was "desparately" seeking divorce partly on the advice of her doctors and partly on her own long felt need to end the marriage. Add to these circumstances the facts that Appellant drafted the agreement, being himself a skilled and experienced attorney, and it is clear why the Danielson rule should have no application to such disputes arising out of separation agreements or divorce decrees. Generally speaking, in many cases for a variety of well known reasons, including the applicable state law as noted supra, a husband has superior bargaining leverage in matrimonial negotiations; that was certainly the case here.

Finally, appellant's stated fear that the proceeding below, if allowed to stand, would open "...floodgates of litigation before a tribunal ill-suited to decide these questions..." is absurd. Not only has the issue of the intent of parties to a separation agreement been constantly before the Tax Court in the past, such matters have been handled expeditiously and fairly in numerous decisions, none of which are cited by appellant. See Enid P. Mirsky, supra, and cases cited therein;

It is also worth noting that this case arose out of action by the Commissioner of Internal Revenue, and not because

Mrs. Weiner sought to alter the tax consequences of the agreement. Appellant's argument that Danielson should control such cases as this is tantamount to requiring the Commissioner to accept without question an agreement which cries out for explanation and fair application of the federal tax laws.

Appellant further argues that this court need only step up from its holdings in Ullman v. Commissioner, supra, and Estate of Rogers v. Commissioner, 445 F. 2d 1020 (2nd Cir. 1971), to adoption of the Danielson rule. However, both those cases in this Circuit (adopting what is referred to as the "strong proof" rule) are concerned with business agreements which, for the reasons stated above, are different generically from separation agreements.

Even if the court is disposed to adopt the rationale of Ullman, supra, and Estate of Rogers, it is submitted upon the foregoing discussion of the evidence that there is "strong proof" in the record that the intention of the parties was that Mrs. Weiner should be paid for her interest in the family house (Tr.26, 34, 45, 47). It can also be argued by the same token that the burden of "strong proof" was on the appellant as petitioner seeking to overturn a deficiency finding of the Commissioner. He has surely failed to meet this burden.

For all the foregoing reasons, the periodic payments at issue herein are subject to the provisions of Section 1-71-1(c)(4) of the Internal Revenue Code Regulations which states in substance, that Section 71(a)(1) or (2) of the Code does not apply to that part of any periodic payment attributable to that portion of any interest in property transferred pursuant to a separation agreement or decree of divorce, if that interest originally belonged to the wife.

II.

THE TAX COURT CORRECTLY REFUSED TO ALLOW APPELLEE TO RE-OPEN THE CASE ON AN ALTERNATE AND INCONSISTANT THEORY OF LAW

Appellant's often stated surprise at the theory of the decision below, i.e. repayment of the wife's equity rather than repayment of a loan, is totally disingenuous. It is tantamount to saying that counsel for appellant was completely unaware of the long line of tax court cases including Mirsky and Gerlach, supra, against which he had to content in bringing his petition in the first instance. A pre-trial review of the case law concerning separation agreements and the treatment of alimony to say nothing of the relevant Code sections, even by modestly competent counsel, would have revealed that in all liklihood if appellant were to lose at trial it would be on the basis that payment to the wife of $29,000 in reality constituted payment for the amount she had invested in the house. It is incredible, given the quality of Appellant's counsel, that such a review was not made. The court therefore quite properly refused to allow consideration of whether Section 483(a) would be applicable to a transaction of the sort found during the trial. Appellant states on page 20 of his brief that the trial court has raised an issue sua sponte. This too is disingenuous; in effect all the trial court did was to deem the pleading of Lois Weiner amended

to conform to her proof. Again, the proof stipulated to and testified to was entirely in support of the proposition that $29,000 was payment to appellee for her interest in the house. Counsel for appellant cannot seriously argue before this court that facts relating to the issues discussed by Judge Sterrett in the Order below were initially discovered at or after trial. There are no extraordinary circumstances here; Pepi, Inc. v. Commissioner, 448 F. 2d 141, (2d Cir. 1971) is not applicable, nor is Wilson v. Commissioner, Docket No. 73-2820 2d Cir. 1974.

The Tax Court cited in its memorandum of January 2, 1974, Estate of Akos Anthony Horvath, 59 TC 551 (1973), in refusing to allow appellant to raise an alternate theory after the reasoning of the court's decision was published. Judge Sterrett discussed the matter from the point of view of prejudice to a petitioner resulting from a change made at trial in the theory of assessment of tax deficiency by IRS. The Tax Court was concerned there, as in this case, that there be no prejudice resulting from the late assertion of a wholly new theory of liability which could have been properly and timely pleaded and proven. A new issue not raised in pleadings will not be heard by the Tax Court. William G. Robertson, 55 T.C. 862 (1971). Appellant was fully capable of raising all alternate theories of relief in his petition and should not be allowed to relitigate after the trial court's rationale is stated.

Conclusion

For the foregoing reasons the judgment of the United States Tax Court should be in all respects affirmed.

Respectfully submitted,

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STATUTORY ADDENDUM

Section 71 of the Internal Revenue Code
26 U.S.C., Subtitle A, Chapter 1

Sec. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS

(a) General Rule.--

(1) Decree of Divorce or Separate Maintenance.-- If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) Written Separation Agreement.-- If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly. ...

(c) Principal Sum Paid in Installments.--

(1) General Rule.-- For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.

(2) Where Period For Payment Is More Than 10 Years.-- If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1)) the installment

payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received. ...

Section 215 of the Internal Revenue Code
26 U.S.C., Subtitle A, Chapter 1

Sec. 215. ALIMONY, ETC., PAYMENTS.

(a) General Rule.-- In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income. ...

Section 483 of the Internal Revenue Code
26 U.S.C., Subtitle A, Chapter 1

Sec. 483. INTEREST ON CERTAIN DEFERRED PAYMENTS.

(a) Amount Constituting Interest.-- For purposes of this title, in the case of any contract for the sale or exchange of property there shall be treated as interest that part of a payment to which this section applies which bears the same ratio to the amount of such payment as the total unstated interest under such contract bears to the total of the payments to which this section applies which are due under such contract.

(b) Total Unstated Interest.-- For purposes of this section, the term "total unstated interest" means, with respect to a contract for the sale or exchange of property, an amount equal to the excess of--

(1) the sum of the payments to which this section applies which are due under the contract, over

(2) the sum of the present values of such payments and the present values of any interest payments due under the contract.

For purposes of paragraph (2), the present value of a payment shall be determined, as of the date of the sale or exchange, by discounting such payment at the rate, and in the manner, provided in regulations prescribed by the Secretary or his delegate. Such regulations shall provide for discounting on the basis of 6-month brackets and shall provide that the present value of any interest payment due not more than 6 months after the date of the sale or exchange is an amount equal to 100 percent of such payment. ...

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Patrick J. Cafferty being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 49 Finnigan Avenue, Saddle Brook, New Jersey. On October 7, 1974 deponent served the within Brief for Petitioner-Appellee upon Scott P. Crampton, Esq., Assistant Attorney General, Tax Division, Department of Justice, Washington D.C. 20530, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Patrick J. Cafferty

Patrick J. Cafferty

Sworn to before me this
7th day of October, 1974.

John R. Parker

JOHN R. PARKER
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-4504304
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1975